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6
7 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,)

9 Plaintiff,)

10 vs.)

11 WAYDE LYNN KURT,)

12 Defendant.)

10-CR-00114-WFN

United States' Trial Brief

13
14 Plaintiff, United States of America, by and through Michael C. Ormsby,
15 United States Attorney for the Eastern District of Washington, Stephanie Van
16 Marter, and Earl A. Hicks, Assistant United States Attorneys for the Eastern
17 District of Washington, submit the following Trial Brief.

18 **I. BACKGROUND**

19 The Vanguard Kindred (VK) was an Odinist, white supremacist gang
20 founded in 2008 by former leader Keegan VanTuyl. In the Fall of 2008,
21 information was received regarding assaults and other crimes being committed by
22 VK members and their associates. In January 2009 the FBI initiated an
23 investigation into the VK after receiving several reports of group members and
24 associates engaging in felonious assaults and possible violations of federal
25 statutes. Subsequent investigation by the FBI confirmed VK leader Keegan
26 VanTuyl and several other members and associates had engaged in a series of

1 felonious assaults and other criminal acts in furtherance of their white supremacist
2 beliefs. Ultimately, the group was dismantled through pro-active investigation
3 and subsequent prosecution of both VK leader Keegan VanTuyl on federal
4 probation violations and key member Daniel "Church" Wilson on assault charges
5 from the State of Idaho.

6 Wayde Kurt, hereafter referred to as the Defendant or Kurt, was recruited
7 into the VK in December 2008. VK members routinely traveled around Spokane
8 looking for minorities to bait into a verbal and/or physical altercation, a practice
9 referred to by group members as "coon hunting." Wilson and several other VK
10 members encountered the Defendant in downtown Spokane, Washington on
11 December 31, 2008. Wilson exchanged an Odinist greeting with Defendant. The
12 group then asked the Defendant if there were "any niggers or Jews around." The
13 Defendant then directed the group to an area where they might find minorities.
14 Wilson subsequently invited the Defendant to one of the VK blots or social
15 functions. At the time of this encounter, the Confidential Source (hereinafter CS),
16 was already a member of the VK, having been associated with the group since
17 approximately the Summer of 2008. However the CS was only a member of the
18 VK and did not begin cooperating with the government until 2010.

19 Investigation by the FBI determined that Kurt was actively involved with
20 the VK through approximately April 2009. In April 2009 there were a series of
21 events which ultimately led to the imprisonment of several keys members of the
22 VK, to include VanTuyl and Wilson. After they were incarcerated, the Defendant
23 was asked to take over leadership of the VK. However, the VK began to dissolve
24 and was ultimately disbanded in the summer of 2009.

25 In February 2010, the FBI elicited the cooperation of the CS to obtain
26 information relative to other violent white supremacists residing and/or operating

1 in, Washington State. The CS cooperated, in part, to avoid being charged with
2 conduct related to a potential federal firearms violation. On February 15, 2010,
3 the CS was officially admonished and agreed to become a CS for the FBI. During
4 the course of subsequent debriefings, CS advised he had been contacted by, and
5 subsequently met the Defendant in December of 2009, for lunch.

6 In April 2010 the CS reported on contacts with several former VK members.
7 CS provided both the home and cellular telephone for the Defendant and agreed to
8 contact the Defendant to determine his (Defendant's) status within the white
9 supremacy movement.

10 On May 11, 2010, CS met with the Defendant at the direction of the FBI.
11 During the meeting, the Defendant discussed the Northwest Front (NF), a white
12 supremacist organization whose primary objective is the establishment of a
13 whites-only homeland in the states of Idaho, Oregon, and Washington. The
14 Defendant also mentioned that he was a good friend of Richard Kemp, a founding
15 member of the white supremacy domestic terrorism group known as The Order.

16 On or about May 29, 2010, CS received a handwritten letter from the
17 Defendant. In this letter, the Defendant wrote about the NF Constitution, advising
18 the CS of the need to establish a legitimate white government with a monetary
19 system based on a gold or silver standard rather than paper currency. The
20 Defendant further documented he needed thirty more days to establish a new
21 identity in furtherance of the white supremacy cause, noting the name "Wayde
22 Kurt would only bring a bad reputation to a publically exposed political
23 movement." This letter was signed "you brother at arms, Wayde Kurt".

24 On June 25, 2010 CS received a handwritten letter from the Defendant
25 requesting a meeting on June 24, 2010. The requested meeting never occurred
26 because CS received the letter after the proposed meeting date.

1 On July 1, 2010, at the direction of the FBI, the CS met with Kurt. The CS
2 was not fitted with a recording device for this meeting. During the meeting, the
3 Defendant relayed that he possessed a ".357 snub nose revolver." Additionally, the
4 Defendant stated that he illegally entered into Canada and returned with
5 "contraband;" owned an ultra-light aircraft with a 28 gallon fuel tank; was upset
6 that whites were minorities in some states according to the census; was working
7 on his "task" he had been preparing for years; had 10 P.O. boxes with false names;
8 several credit cards in other peoples names; and a "legitimate looking"
9 Washington State driver's license with someone else's name on it. An additional
10 meeting was scheduled for later in that month.

11 On July 22, 2010, at the direction of the FBI, the CS met with the
12 Defendant. Prior to the meeting, the CS was fitted with a recording device. During
13 the meeting, the Defendant discussed purchasing a progressive reloader, making
14 teflon baked bullets to penetrate body armor, and owning a "Saiga" firearm.
15 After the meeting, CS received a handwritten letter from the Defendant which read
16 in part, "I just received the parts that I need for reloading the russian (sic)
17 cartridge. Let's meet this coming Thursday August 12 at 4:30 pm at the Friendship
18 park"

19 On August 12, 2010, at approximately 2:26 p.m., the Defendant was
20 captured on video making a purchase at the General Store located at 2424 N.
21 Division Street, Spokane, Washington. A receipt from the General Store
22 documenting the purchase of one box of 7.62 ammunition on August 12, 2010, at
23 2:26 p.m. was located in the Defendant's wallet which was seized at the time of the
24 Defendant's arrest on August 30, 2010.

25 On August 12, 2010, at the direction of the FBI, CS again met with the
26 Defendant. The CS was wearing a recording device. During the meeting, the

1 Defendant told the CS that he had manufactured 80 rounds of .38 special, had
2 recently switched to 7.62 x 39 ammunition, having purchased a .38 special in a
3 publication like the penny press, and reiterated that he owned a Saiga rifle. The
4 Defendant also stated, "I need a good place where I can go out and do some target
5 practicing." The CS then suggested shooting on his property out in Chewelah,
6 WA.

7 The CS and the Defendant discussed target shooting and agreed to shoot
8 firearms on August 21, 2010. The two agreed to meet on August 21, 2010. The
9 Defendant subsequently instructed the CS that they would load everything into the
10 truck of Kurt's vehicle on August 21, 2010, but that if they get pulled over "it all
11 belongs to [CS]." The Defendant stated the reason was because "your legal, I'm
12 not."

13 On August 21, 2010, at the direction of the FBI, the CS met with the
14 Defendant. The CS was again wearing a recording device. Prior to the meeting,
15 the FBI had installed a covert video camera at the location where Kurt and the CS
16 agreed to shoot their firearms. Also prior to the meeting, a JTTF officer in a
17 surveillance plane observed the Defendant carrying unknown items and placing
18 them into the trunk of his car. The Defendant then left in his car to meet with CS.
19 The plane also observed Kurt meet the CS and watched them proceed to the shoot
20 site in Kurt's car.

21 During the drive north, the Defendant's discussions were recorded on the
22 CS's recording device. The Defendant stated that he needed to make sure
23 everyone is fed up with Obama. The CS asked how. The Defendant responded by
24 saying he would discuss it with the CS after the first of the year. Kurt stated he
25 was currently putting the finances together. Referring to this plan, the Defendant
26 continued saying he didn't want innocent people to die but it was possible they

1 would die. The Defendant stated that it would be an act of terrorism of the worst
2 kind and would mean a death sentence if he was caught. He likened his plan to
3 what happened to the Alfred Murrah Building in Oklahoma City.

4 Once the Defendant and the CS arrived at the shoot site they removed the
5 weapons from Kurt's trunk. CS observed Kurt had brought a Saiga rifle and a
6 snub nose .357 handgun which is consistent with the ammunition Kurt previously
7 discussed producing. The CS brought three weapons of his own. During the
8 shoot, Kurt fired all five weapons.

9 At this point in the investigation, it was determined to allow Kurt to take the
10 two firearms he had with him. This determination was made for two reasons.
11 First, the investigators did not want to jeopardize the safety or identify of the CS.
12 Second, investigators did not want to compromise the ongoing investigations into
13 Kurt's domestic terrorism plot, the use and manufacture of counterfeit currency,
14 and the illegal use and manufacture of false identification.

15 On August 30, 2010, at the direction of the FBI the CS met with the
16 Defendant. The CS was again wearing a recording device. Following this meet
17 the Defendant was arrested by the FBI and has remained in custody since the date
18 of his arrest.

19 **II. Evidentiary Issues:**

20 **A. Admissibility of Prior Uncharged Acts that are Inextricably** 21 **Intertwined with the Charged Offenses or Alternatively, pursuant** 22 **to Fed. Rules of Evid.404(b) Evidence**

23 As the Court is aware, while this is a straight forward possession case, it is
24 not the typical felon in possession case. The reason the Defendant was initially
25 the subject of an FBI investigation, was not just due to his possession of firearms
26 but due to his extensive involvement in groups which advocated violence in the
27 name of moving towards the "final solution." As a result, throughout the recorded

1 contact with the CS as well as testimony about the VK, there are a number of areas
2 discussed which the United States submits are admissible as events which are
3 inextricably intertwined with the charged offense or in the alternative, would be
4 admissible pursuant to Fed.R.Evid., Rule 404(b). Aside from the information
5 contained in the summary above, the following is a summary list of the areas the
6 United submits would be admissible:

7 (1) recorded statements Defendant made to the CS on July 22, 2010, to wit:
8 making ammo; teflon coating ammo; building or buying a suppressor; test
9 firing ammo on body armor to determine if the ammo can penetrate body
10 armor; possessing a Saiga rifle; and preferring tactical silent hits.

11 (2) recorded statements Defendant made to the confidential source on
12 August 12, 2010 to wit: Purchasing a .38 special in a publication like the
13 penny press; making 80 rounds of .38 ammo; desire to blow out traffic
14 camera; .50 BMG could be used to take down a plane from anywhere;
15 suggesting target practice at his residence; and loading guns into
16 Defendant's trunk but that if they get caught that the weapons belong to the
17 confidential informant because Defendant is not legal.

18 (3) recorded statements Defendant made to the confidential source on
19 August 21, 2010 to wit: that Defendant is going to do everything in his
20 power to stop President Obama from being re-elected; false flag operation ;
21 possibility of innocent people dying; suicide mission; shooting in low light
22 and hostage situations; planning something big involving several city blocks
23 after the winter solstice; and that Defendant brought a "Saiga" and a ".357
24 snub nose" revolver.

(4) recorded statements Defendant made to the confidential source on August 30, 2010 to wit: recruiting; finances; laws on paramilitary training; possessing a box full of gun powder; make up artists; and counterfeiting.

(5) Defendant knew the CS through connections with a white supremacist gang of which all members were on the domestic terrorism watch list.

1. Inextricably Intertwined

"Evidence of 'other acts' is not subject to Rule 404(b) analysis if it is 'inextricably intertwined' with the charged offense." *United States v. Beckman*, 298 F.3d 788, 793–94 (9th Cir.2002) (citing *United States v. Vizcarra–Martinez*, 66 F.3d 1006, 1012 (9th Cir.1995)). This exception may be triggered in one of two ways. First, it applies when other-acts "evidence ... constitutes a part of the transaction that serves as the basis for the criminal charge." *Vizcarra–Martinez*, 66 F.3d at 1012. Where the alleged evidence is "inextricably intertwined" with the charged offense, the court may admit the evidence without regard to Rule 404(b). *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir.2004) (citing *Vizcarra–Martinez*, 66 F.3d at 1012). Thus, in *United States v. Williams*, 989 F.2d 1061, 1070 (9th Cir.1993), the Ninth Circuit "concluded contemporaneous sales of cocaine and crank by the defendant were inextricably intertwined with the crime with which the defendant was charged: the sale of cocaine." *Vizcarra–Martinez*, 66 F.3d at 1012. As noted in *Williams*, "[t]he policies underlying rule 404(b) are inapplicable when offenses committed as part of a 'single criminal episode' become other acts simply because the defendant 'is indicted for less than all of his actions.'" *Id.* (quoting *Williams*, 989 F.2d at 1070 (quoting *United States v. Soliman*, 813 F.2d 277, 278 (9th Cir.1987))).

Second, the exception applies when "other act" evidence is necessary: to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime; it is obviously necessary in certain cases for the government to explain either the circumstances

1 under which particular evidence was obtained or the events
2 surrounding the commission of the crime. This exception to Rule
3 404(b) is most often invoked in cases in which the defendant is
4 charged with being a felon in possession of a firearm.

5 *Vizcarra–Martinez*, 66 F.3d at 1012–13.

6 In these cases, other-acts evidence is not character evidence, but " 'direct
7 evidence,' used to flesh out the circumstances surrounding the crime with which
8 the defendant has been charged, thereby allowing the jury to make sense of the
9 testimony in its proper context." *United States v. Ramirez–Jiminez*, 967 F.2d 1321,
10 1327 (9th Cir.1992). "A jury is entitled to know the circumstances and
11 background of a criminal charge. It cannot be expected to make its decision in a
12 void—without knowledge of the time, place, and circumstances of the acts which
13 form the basis of the charge." *United States v. Daly*, 974 F.2d 1215, 1217(9th
14 Cir.1992), *quoting United States v. Moore*, 735 F.2d 289, 292 (8th Cir.1984). In
15 *United States v. Beckman*, 298 F.3d 788, 794 (9th Cir.2002), a defendant was
16 charged with importing over 1,500 pounds of marijuana. His defense was that he
17 was tricked into transporting the marijuana by the chief government cooperating
18 witness. This witness testified at length about prior drug runs that Beckman had
19 made on his behalf. The Ninth Circuit found that the witness's testimony was
20 "inextricably intertwined" with the charged offense, because it was "intended to
21 establish the witness's relationship to Beckman and to show that the relationship
22 was ongoing. See also, *United States v. Curtin*, 443 F.3d 1084, 1089-1091 9th
23 Cir. 2006); *United States v. Serang*, 156 F.3d 910, 915-916 (9th Cir. 1998) *cert.*
24 *denied*, *Serang v. United States*, 525 U.S. 1059, 119 S.Ct. 627(U.S. 1998); *See*
25 *also United States v. Daly*, 974 F.2d 1215, 1217 (9th Cir. 1992) (holding that
26 "evidence concerning other acts that are inextricably intertwined with the charged
27 acts may be admitted" to "*put [defendant's] illegal conduct into context and to*
rebut his [defense]") (emphasis added).

1 Here, both prongs are satisfied. The Defendant's statements which discuss
2 firearms are directly intertwined to his knowingly possessing firearms. Moreover,
3 Defendant's statements regarding the reasons he possessed firearms to include a
4 planned suicide mission involving several city blocks are intertwined with his
5 illegal possession of firearms. It is intertwined because it directly explains the
6 circumstances under which particular evidence was obtained.

7 Similarly, Defendant's membership in an organization of which its members
8 were placed on the domestic terrorism watch list explains the how the evidence
9 was obtained. Defendant likely would not have been the target of an investigation
10 but for his membership in an organization which advocated the violent overthrow
11 of the United States government. Thus, the fact that Defendant was on the terrorist
12 watch list, had a "plan" in the works, and was putting together resources to
13 accomplish his plan, is all intertwined. These facts explain a coherent and
14 comprehensible story regarding Defendant's illegal possession of firearms.

15 Additionally, the United States anticipates Defendant will try to justify his
16 criminal conduct by claiming he was entrapped. To rebut an entrapment defense, it
17 is appropriate to offer evidence that, before or after the charged offense, the
18 defendant was involved with firearms or ammunition. *United States v. Segovia*,
19 576 F.2d 251, 252 (9th Cir. 1978) (discussing drug possession). The United States
20 should be allowed to explain the circumstances surrounding how and why the
21 Defendant knew the CS and why there was an agreement to meet for target
22 practice. Those circumstances are intertwined with the Defendant's involvement
23 with these groups and his plans for terrorist activities, all of which allow the
24 United States to rebut his entrapment defense. Moreover, the absence of such
25 evidence will hinder the United States ability to tell a coherent story of the facts
26 leading to Defendant's charged conduct and rebut any entrapment defense. It will

1 particularly hinder the United States ability to show that Defendant was
2 "predisposed" to commit the charged offense.

3 Therefore, the United States should be allowed to present the above stated
4 evidence as inextricably intertwined to Defendant's commission of the crime.

5 **2. Otherwise Admissible Pursuant to Fed. R. Evid., Rule 404(b)**

6 Even if the Court were to apply a Federal Rules of Evidence, Rule 404(b)
7 analysis, the testimony is likewise admissible. Federal Rule of Evidence 404(b)
8 provides:

9 Evidence of other crimes, wrongs, or acts is not admissible to prove
10 the character of a person in order to show action in conformity
11 therewith. It may, however, be admissible for other purposes, such as
12 proof of motive, opportunity, intent, preparation, plan, knowledge,
identity, or absence of mistake, or accident, provided that upon
request by the accused, the prosecution in a criminal case shall
provide reasonable notice in advance of trial.

13 The Ninth Circuit employs a four-part test to determine admissibility of
14 prior "bad act" evidence:

15 To be probative of something other than criminal propensity, the prior
16 bad act evidence must: (1) prove a material element of the crime
17 currently charged; (2) show similarity between the past and charged
conduct; (3) be based upon sufficient evidence; and (4) not be too
remote in time.

18 *United States v. Johnson*, 132 F.3d 1279, 1282 (9th Cir. 1997). *See also United*
19 *States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). Additionally, the
20 probative value of the evidence must be examined under the balancing test of Fed.
21 R. Evid. 403. *Arambula-Ruiz*, 987 F.2d at 602.

22 "Evidence of a defendant's prior act is admissible under Rule 404(b) if that
23 'evidence is probative of a material issue in the case.'" *United States v. Jones*, 982
24 F.2d 380, 382 (9th Cir. 1993) (quoting *United States v. Ramirez-Jiminez*, 967 F.2d
25 1321, 1325 (9th Cir. 1992)). The United States may introduce evidence of prior
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1 acts provided that such acts “tend[] to make the existence of [the Defendant’s]
2 knowledge or intent more probable than it would be without the evidence.” Id.

3 **a. Material Element**

4 Testimony of the Defendant’s membership in this organization and his
5 statements as to the reasons he was manufacturing his own ammunition and
6 possessing firearms, are relevant to a material element of the charged offense
7 because it tends to show knowledge and intent. Knowledge is a material element
8 of the crime of felon in possession of firearms. *United States v. Beasley*, 346 F.3d
9 930, 934 (9th Cir. 2003), *cert. denied*, 542 U.S. 921 (2004). This evidence will go
10 to negate any claim that the Defendant was “entrapped” or was not predisposed to
11 his possession and use of these firearms. Therefore, the evidence will go to show
12 knowledge and intent, and will not be admitted merely to show criminal
13 disposition.

14 **b. Similarity**

15 When offered to prove knowledge, however, the prior act need not be
16 similar to the charged act as long as the prior act was one which
17 would tend to make the existence of the defendant’s knowledge more
18 probable than it would be without the evidence.

19 *United States v. Arambula-Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993) (*quoting*
20 *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1326 (9th Cir. 1992). There is a
21 obvious factual similarity between the Defendant’s earlier possession of firearms
22 and his manufacture of ammunition and his possession and use of these same
23 firearms on the day in question. Additionally, the Defendant’s intentions as to
24 these firearms as a part of his membership in these groups, is a necessary
25 foundation to the similar charge of felon in possession of firearms.

1 **c. Sufficient Proof**

2 This prior bad act testimony is supported by sufficient evidence. “[S]imilar
3 act evidence is relevant only if the jury can reasonably conclude that the act
4 occurred and that the Defendant was the actor.” *Huddleston v. United States*, 485
5 U.S. 681, 689 (1988). “This reliability threshold is not a high one, and the
6 testimony of a single witness can be sufficient.” *Johnson*, 132 F.3d at 1283 (citing
7 *United States v. Hinton*, 31 F.3d 817, 823 (9th Cir. 1994)). Here, this evidence is
8 based upon recorded statements and video of the Defendant. Thus, this evidence
9 more than satisfies the low threshold required by this part of the test.

10 **d. Remoteness**

11 The prior acts to be admitted occurred during the same time period as the
12 charged offense. The court has held that even remote acts may be admissible if
13 they are extremely probative and relevant. *See United State v. Johnson*, 132 F.3d
14 1279, 1283 (9th Cir. 1997) (prior act evidence from thirteen or more years ago was
15 sufficiently similar to the charged conduct to render it probative despite the
16 passage of time) (quoting *United States v. Spillone*, 879 F.2d 514, 519 (9th Cir.
17 1989). Thus, it is clear in this case that prior acts which occurred within the same
18 time period, within several months of the charge at issue, are not too remote.

19 **e. Probative Value/Prejudicial Effect**

20 “Relevant evidence means evidence having any tendency to make the
21 existence of any fact that is of consequence to the determination of the action more
22 probable or less probable than it would be without the evidence.” Fed. R. Evid.
23 401. Moreover, the probative value of the other acts evidence must also outweigh
24 its prejudicial effect. See, Fed. R. Evid. 403.

25 The district court engages in the requisite balancing of probative value of
26 prior conviction with its prejudicial value when the judge gives an appropriate

1 instruction limiting the purpose for which the jury could consider evidence of the
2 defendant's prior conviction. *See United States v. Arambula-Ruiz*, 987 F.2d 599,
3 604 (9th Cir. 1993); *United States v. Rubio-Villareal*, 927 F.2d 1495, 1503
4 (holding probative value or prior drug conviction outweighed any prejudice
5 because of high need for evidence coupled with judge's careful limiting
6 instruction weighed in favor of admission).

7 This evidence is relevant because it makes it more probable that the
8 Defendant possessed the described firearms. The Defendant's basis for his illegal
9 conduct is his beliefs and involvement in groups which espouse violence. The
10 Defendants statements, intention and knowledge are so intertwined with this
11 offense there is no legitimate way to separate the evidence. More importantly, this
12 evidence becomes even more probative in consideration of the Defendant's theory
13 of entrapment. Lastly, any prejudicial effect can be minimized with a limited
14 instruction by the trial court. This limiting instruction will tip the scales in favor
15 of the evidence being more probative than prejudicial.

16 **B. Tape recordings and transcripts**

17 As the Court is aware, there are a number of tape recorded conversations
18 with transcripts that the parties have been working on in order to try and come up
19 with an agreement as to what should be admitted. At this time, the United States
20 does not believe there is a dispute and believes the admissibility of the evidence
21 will be agreed upon. However, should there become an issue, the United States
22 submits the following.

23 The authentication of the tapes and transcripts is a factual issue to be
24 decided by the Court, not the jury. Fed. .R. Evid. 104(a), 901(a). Or in other
25 words, conflicting evidence on genuineness goes to the weight, not the
26

1 admissibility, so long as some reasonable person could believe the item is what it
2 is claimed to be. *United States v. Johnson*, 637 F.2d 1224, 1247 (9th Cir. 1980).
3 Federal Evidence Rule 901(a) provides:

4 (a) General provision. The requirement of authentication or
5 identification as a condition precedent to admissibility is satisfied by
6 evidence sufficient to support a finding that the matter in question is
7 what its proponent claims.

8 To satisfy Rule 901, the government must show that the proffered tapes are
9 true, accurate, and authentic recordings of the conversations between the parties.
10 *United States v. Panaro*, 266 F.3d 939, 951 (9th Cir. 2001); *see also United States*
11 *v. Mouton*, 617 F.2d 1379, 1383-84 (9th Cir. 1980) (For a recording to meet the
12 authenticity requirement, a trial court, in the exercise of its discretion, must be
13 satisfied that the recording is "accurate, authentic, and generally trustworthy.").

14 Generally, as long as recordings are authentic and reliable, the decision to
15 admit them into evidence rests in the sound discretion of the trial court. *United*
16 *States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983). The trial judge exercises
17 great latitude when deciding if recordings and transcripts of those recordings are
18 admissible.

19 Likewise, the preferable means of authenticating transcripts of taped
20 conversations is stipulation between the parties or a pretrial determination by the
21 court. The use of transcripts during trial, even in situations where the actual
22 recordings are not played for the jury, is reviewed for abuse of discretion. *United*
23 *States v. Pena-Espinoza*, 47 F.3d 356, 359 (9th Cir. 1995). The foundation for
24 authentication of the transcripts will consist of the testimony of FBI Special Agent
25 Joseph Cleary. The transcripts in this case were originally prepared by S/A Ryan
26
27

1 Butler and S/A Cleary.¹ Rather than attempt to identify and subpoena the
2 particular preparer of each transcript, both the CS and Agent Cleary have listened
3 to each recording and reviewed the transcription. Thus, both the CS and Agent
4 Cleary will testify that they have reviewed the transcripts "word-for-word," have
5 listened to the tapes, and have found that the transcripts are accurate. *See, e.g.,*
6 *United States v. Rengifo*, 789 F.2d 975, 983 (1st Cir. 1985).

7 DATED September 6, 2011.

8 Michael C. Ormsby
9 United States Attorney

10 s/ Earl A. Hicks

11 Earl A. Hicks
12 Assistant United States Attorney

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24 ¹The records were transcribed as follows: July 22, 2009, recording by S/A
25 Butler; August 12 recording by S/A Butler and S/A Cleary; August 22, 2010
26 recording by S/A Butler; August 21, 2010, recording by S/A Butler; August 30,
27 2010, recording by S/A Butler.
United States' Trial Brief - 16

1 I hereby certify that on September 6, 2011, I electronically filed the
2 foregoing with the Clerk of the Court using the CM/ECF System which will send
3 notification of such filing to the following, and/or I hereby certify that I have
4 mailed by United States Postal Service the document to the following non-
5 CM/ECF participant(s):

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